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Supreme Court of the United States

OCTOBER TERM 1966

No. 553

McALLISTER BROTHERS INC.,
Petitioner,

against

TANKERS AND TRAMPS CORPORATION,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHRISTOPHER E. HECKMAN,
Counsel for Petitioner,
80 Pine Street,
New York, N. Y. 10005.

FOLEY & MARTIN,
JOHN H. HANRAHAN,
STEPHEN J. BUCKLEY,
of Counsel.

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TANKERS AND TRAMPS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

McAllister Brothers Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this cause on April 18, 1966, which, by a divided court, affirmed the granting by the United States District Court for the Southern District of New York of an interlocutory decree awarding respondent recovery from petitioner of the full amount of damages sustained by respondent as a result of the stranding of the respondent's vessel *Atlas* while being navigated under the direction of a harbor pilot in petitioner's general employ.

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York (R., Vol. I, 4-22)* printed in the Appendix hereto (*infra*, pp. 1a-19a) and not officially reported, is reported at 1964 A.M.C. 2551. The majority

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* References preceded by the letter "R" refer to the Record.

and the dissenting opinions of the Court of Appeals for the Second Circuit (R., Vol II, 78-86) appear in the Appendix hereto (majority *infra*, pp. 21a-26a; dissent *infra*, pp. 26a-28a) and are reported at 358 F. 2d 896 (1966).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on April 18, 1966 (R., Vol II, 87; *infra*, p. 29a). A timely petition to the Court of Appeals for rehearing and a supplemental petition for the same relief were denied by orders filed June 21, 1966 (R., Vol. II, 100-115; *infra*, pp. 30a-33a).

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Did the majority of the Court of Appeals apply the correct appellate test when it affirmed the District Court because it could not say that the latter's conclusions of law were "clearly erroneous" or should the majority have considered the questions of law independently of the District Court's decision as the dissenting Judge did when he decided that the District Court should be reversed?

2. When the issue is one of law involving the question whether the actions of parties, as proven by the filing of a stipulation of facts, amounted either to an offer and acceptance or to an accord and satisfaction, must appellant show "clear error" on appeal or is not appellant entitled to an independent review of the legal question by the Court of Appeals instead of a mere search for "clear error"?

3. When a corporate employee, whose capacity is not disclosed, orders services by telephone without discussing rates, terms or conditions and when simultaneously with, or shortly after performance of the requested services, the

corporate employer receives a writing which sets forth the rates, terms and conditions applicable to the transaction (a bill with the terms and conditions appearing in bold type) and sends its check covering the stated rate, must the other party prove affirmatively that those terms and conditions came to the attention of a responsible employee of the corporation or does not the proof of the above facts cnstitute a *prima facie* case of contract placing upon the corporate payor the duty to produce evidence that no responsible employee intended to agree to those terms and conditions?

4. In the absence of evidence to the contrary may it not be presumed, under the facts stated in question 3 above, that the corporate employee who ordered the services, checked, approved and accepted the bill stating the terms and conditions upon which the stated charge was based and may it not be further presumed that, having had the authority to order the services, the employee also had authority to bind the corporation to the terms contained in the bill which he accepted and approved for payment without protest and without business duress?

5. When the circumstances stated in questions 3 and 4 above had occurred on four previous occasions, is not the party who contests application of one of the terms stated in the bill bound to offer evidence to substantiate its denial that one of those terms and conditions was included in the agreement?

6. When the corporate employee who received the services signed a receipt which stated the applicable terms and conditions and such employee has been proven to be one possessing the authority to bind the corporation (in this case the master of an ocean-going tanker) is not proof of that fact and the other circumstances stated in questions 3 and 4 sufficient to establish the terms as part of the contract, especially in the absence of other evidence, even though the signer says he did not read the terms and conditions stated on the receipt?

Statement of the Case

Based solely upon a stipulation of facts (R., Vol. I, 22-32) the District Court found, and the Court of Appeals adopted, the following facts:

Respondent's tanker *Atlas* was seriously damaged as a result of the stranding in the Kill Van Kull in New York Harbor on the morning of November 24, 1958 while one Daisey, in petitioner's general employ, was acting as pilot of the *Atlas* on her trip from Stapleton, Staten Island, to Linden, New Jersey, both in New York Harbor.

The stranding occurred because during fog and while navigating by radar the pilot gave the ship's master directions for left rudder instead of right rudder with the result that the ship left the channel and stranded on the port side thereof (R., Vol. I, 7-9); Findings 16 and 23; *infra,* pp. 4a-5a, 6a).

On the day preceding the stranding respondent's agent, Cargo and Tankship Management, Inc., called petitioner's tug dispatcher and requested that tugs and a pilot be furnished on the following morning to assist the *Atlas* during the above described harbor change of berth in which the *Atlas* was to use her own power. Price was not discussed nor was any other term or condition mentioned (R., Vol. I, 9-10; Findings 29 and 30; *infra,* pp. 6a-7a).

On at least four previous occasions petitioner had performed similar services for respondent's agent and the latter had received and paid petitioner's bills therefor which set forth on the face in bold print the Pilotage Clause under the terms of which the pilot furnished by petitioner became respondent's servant in respect of piloting the vessel and giving orders to the assisting tugs (R., Vol. I, 11-12; Findings 32-36; *infra,* pp. 8a-9a). Two of those occasions involved previous voyages of the *Atlas* (R., Vol. I, 11-12; Finding 33; *infra,* pp. 8a-9a).

The first writing in respect of the involved transaction was a receipt for services presented to and signed by the

master of the *Atlas* upon completion of the pilotage service and shortly after the damage was known. On that receipt the exculpatory pilotage clause is set out in full immediately below the line on which the master signed his name (R., Vol. I, 10; Finding 31; *infra*, pp. 7a-8a). The *Atlas* master had signed similar slips on the two previous occasions in respect of which respondent's agent had received and paid petitioner's bills (R., Vol. I, 11-12; Finding 33, *infra*, pp. 8a-9a). The receipts for services signed by the *Atlas'* master are in the Record as Exhibits E, G, and I (R., Vol. I, 40, 44, 48).

Respondent did not produce any testimony that its employees or agents were not familiar with the pilotage clause or were not aware that it appeared on petitioner's bills or did not intend that it should apply to this transaction.

The bills were based upon a rate schedule circulated by petitioner (R., Vol. I, 12; Finding No. 36; *infra*, p. 9a) and no witness testified that he did not have the rate schedule when ordering the services or when checking and approving the bills. The rate schedule sets forth the pilotage clause in legible type (R., Vol. I, 52; Exhibit K).

The District Court concluded as a matter of law that the undisputed facts were not sufficient in law to make the pilotage clause applicable to this transaction. In reaching that conclusion of law, the District Court reasoned that the facts were not the same as in other cases in which it had been held as a matter of law that the proof was sufficient to establish that the parties intended to include the clause in their agreement. Without directly passing upon the legal conclusions to be drawn from the stipulated facts in this case the District Court dismissed the libel, seemingly under the belief that the previously decided cases which he cited laid down the test for the minimum proof required. The majority of the Court of Appeals affirmed on the ground that the District Court's conclusions of law were not clearly erroneous. Judge Hays, in a strong dissent, held as a matter of law that the proof of prior dealings

was "enough to establish that the parties intended the pilotage clause to be incorporated into the oral contract" (R., Vol. II, 85; *infra,* p. 27a).

Reasons for Granting the Writ

Involved are two questions of law of great importance to the business world which should be settled by this Court. One involves the scope of review by a United States Court of Appeals to which a litigant is entitled when it raises a question of law decided adversely by a District Court. The other is the legal effect of prior and subsequent dealings between the parties when, as so often occurs in these busy times, the bare essentials of a contract are arranged by telephone and other details equally important are left to prior understandings or to writings delivered after the contract has been completely performed by one party.

As to the first question, this decision is in conflict with other Circuits. The Fourth Circuit said in *Olah* v. *SS. Jaladurga,* 343 F. 2d 457, 459 (1965):

> "On a matter of law we may and must apply an independent judgment."

The Third Circuit held in *Automatic Devices Co.* v. *Automatic Devices Co. of Pa.,* 292 F. 2d 663 (1961) that the injunction of Fed. Rules Civ. Proc. Rule 52(a), 28 U. S. C. A. concerning the Appellate Court's duty to accept fact findings not clearly erroneous does not apply "to the conclusion reached from the facts found".

The Fifth Circuit follows the rule of the Fourth and Third cf. *Green* v. *Bluff Creek Oil Co.,* 287 F. 2d 66 (1961).

While the answer to the second question is of great importance to the shipping industry of the nation, its effect is not limited to maritime interests. The decision of which review is sought will have its impact on the countless seg-

ments of United States commerce wherein important business transactions have their commencement in one or two telephone conversations, often between employees of corporations of different states. During such conversations one, if not both, of the conversing parties relies upon a prior course of dealings between them or upon receipts, bills, confirmations or other documents to be sent later, to spell out additional terms of the agreement which, in these modern times, the participants in the telephone conversations do not have time to state. There are countless transactions in which a party orders work or goods without mention of price or conditions. Clearly such party either knows from previous dealings what price and conditions he might reasonably expect or he anticipates that he will later receive a bill and statement of conditions which he may accept and pay or else negotiate for better rates or conditions. The business world should know whether in litigation in the United States courts the party sending the bill with the conditions boldly printed thereon may rely upon payment of the bill without protest as an acceptance of the stated conditions by the other party.

The holding of the majority of the Court of Appeals is, we submit, in conflict with the teachings of the outstanding texts on the subject. Cf., Restatement (Second) Contracts (Tent. Draft No. 1, 1964) Secs. 21, 23, 26, 32; Corbin on Contracts, Vol. 6, Sec. 1290.

Williston on Contracts states (3rd Ed., Vol. 1, Sec. 90A, pp. 292-3):

> "The acceptance of a paper which purports to be a contract sufficiently indicates an assent to its terms whatever they may be, and it is immaterial that they are, in fact, unknown."

And in Sec. 90C at p. 311:

> "If acceptance of a document is the equivalent of assent, the same rule should apparently be applied to any case where the one receiving the document

was aware or should have been aware that there were terms and conditions upon it, whether these were legible or not."

The Pilotage Clause has been considered and upheld by this Court. *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291.

Conclusion

It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by petitioner.

Dated: New York, New York
September 9, 1966.

Respectfully submitted,

CHRISTOPHER E. HECKMAN,
Counsel for Petitioner,
80 Pine Street,
New York, N. Y. 10005.

FOLEY & MARTIN,
JOHN H. HANRAHAN,
STEPHEN J. BUCKLEY,
of Counsel.

APPENDIX

Opinion, Findings of Fact and Conclusions of Law of United States District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

TANKERS AND TRAMPS CORPORATION,
Libellant,

against

Tug *Jane McAllister*, Tug *Margaret M. McAllister*, her engines, boilers, etc., McALLISTER BROTHERS, INC. and PILOT L. DAISEY,
Respondents.

60 Ad. 185

Appearances:

POLES, TUBLIN & PATESTIDES, Proctors for Libelant.

FOLEY & MARTIN, Proctors for Respondents.

LEVET, D. J.

The libellant, Tankers & Tramps Corporation, as owner of the SS. *Atlas*, seeks recovery from McAllister Brothers, Inc. and two of its tugs, the *Jane McAllister* and the *Margaret M. McAllister*, for damage to the vessel occasioned by its grounding in Kill Van Kull channel on the morning of November 24, 1958.

After hearing the testimony of the parties, examining the exhibits, the pleadings, the briefs, the stipulations of the parties and the proposed findings of fact and conclusions of law submitted by counsel, this court makes the following Findings of Fact and Conclusions of Law pursuant to Admiralty Rule 46½:

Opinion, Findings of Fact and Conclusions of Law of District Court

FINDINGS OF FACT

1. The libellant, Tankers & Tramps Corporation was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware and was and now is the owner of the SS. *Atlas*.

2. The Tug *Jane McAllister* was at the time of the institution of this action within the jurisdiction of this court and was owned and operated by the respondent McAllister Bros., Inc.

3. The Tug *Margaret M. McAllister* was at the time of the institution of this action within the jurisdiction of this court and was owned and operated by the respondent McAllister Bros., Inc.

4. The respondent McAllister Bros., Inc. was and now is a corporation organized and existing under and by virtue of the laws of the State of New York and provides tugs and sends pilots to assist in the transportation and docking of vessels in the Port of New York. In connection with those services it pays a number of licensed pilots to be available for boarding ships assisted by McAllister tugs. These men pilot the vessels and direct the tugs and advise and assist the master with respect to the handling of the ships and the use of and the giving of orders to the tugs during such operations.

5. On or about November 23, 1958, Cargo and Tankship Management Inc. were agents for the vessel SS. *Atlas*.

I. THE GROUNDING

6. The *Atlas* arrived at and was anchored at Stapleton Anchorage on the evening of November 23, 1958. After lighterage of 7,608.77 barrels of gasoline, the draft of the vessel was trimmed to 32 feet fore and aft.

7. On the morning of November 24, 1958, prior to 0445 hours, the Tugs *Jane McAllister* and *Margaret M. McAllis-*

ter came alongside the *Atlas*. Pilot Lora Daisey boarded the vessel from the *Margaret M. McAllister* and took his position on the bridge. During all the maneuverings from Stapleton Anchorage to the completion of the docking, the master of the vessel, Captain Gerard Redden, the Second Mate, D. Kloss, the Quartermaster, R. Holt, and Pilot Daisey were on the bridge of the *Atlas*. The orders and signals for the steering and engine movements of the *Atlas* were given by Pilot Daisey in his capacity as pilot. The engine room signals were transferred from the bridge to the engine room by Second Mate Kloss by use of the ship's engine room telegraph. All times recorded were to the nearest half minute. The helm orders were executed by Quartermaster Holt on the telemotor hydraulic steering wheel and system. At all times, the ship's engines, machinery and equipment were available for use.

8. Before heaving anchor, Captain Redden advised Pilot Daisey that only the port boiler was in operation. With one boiler in operation the *Atlas* had sufficient power for maneuvering and docking. All other operational and navigational equipment of the *Atlas* was in proper working order.

9. The *Atlas* commenced to heave anchor at 0445 hours and after being turned around by use of both tugs and her own engines she headed for the Kill Van Kull Channel with Pilot Daisey in command. The Tug *Margaret M. McAllister* took a position fast to the vessel on the port bow forward of the bridge. The Tug *Jane McAllister* took a position fast to the vessel on the starboard bow forward of the bridge.

10. Visibility was good at Stapleton and the *Atlas*, with tugs alongside, proceeded around St. George, Staten Island, and entered Kill Van Kull Channel without incident.

11. In the Constable Hook Reach the *Atlas* was proceeding at about 7 knots with the telegraph set at half speed

ahead and the tugs on her bow. Visibility was good and Captain Redden and Pilot Daisey could see lights on the Bayonne Bridge.

12. When the *Atlas* was off Port Johnson, the *Margaret M. McAllister* asked and received the permission of Pilot Daisey to leave the vessel and take its tugmaster, Hans Eide, ashore. Eide went ashore in connection with McAllister Bros.' business and pursuant to instructions received from McAllister Bros., Inc. several days before. (Lib. Ex. 5, pp. 20-21) This was done by prior arrangement between Pilot Daisey and George Fuhr, mate of the *Margaret M. McAllister,* but without the prior knowledge of Captain Redden. The Tug *Jane McAllister* remained fast to the starboard bow of the *Atlas.* At this time the visibility was good.

13. When the *Atlas* and the Tug *Jane McAllister* were entering Bergen Point East Reach, less than one mile east of the Bayonne Bridge, a dense fog suddenly set in reducing visibility to less than 250 feet.

14. After encountering the fog, the pilot at 0551 reduced the speed from half to slow speed (Lib. Ex. 3, p. 14) and Captain Redden manned the radar in the wheelhouse.

15. The radar screen on the *Atlas* was set on a one mile scale and Captain Redden advised the pilot of the ship's position from his observations of the radar screen. On several occasions, perhaps three or four, Captain Redden advised Pilot Daisey that the *Atlas* was getting too close to the port shore. The pilot himself did not look at the radar.

16. In spite of these warnings, the pilot at 0553 commanded an easy left rudder, then a hard left rudder. These commands would tend to move the vessel closer to the port shore. When Captain Redden heard these orders he left the radar, went to the port wing of the bridge and told

Pilot Daisey, "we are very close to the port shore." The pilot then entered the wheelhouse, looked at the rudder indicator and shouted, "Hard right and full astern." The time between the easy left order and the hard right was about 30 seconds. The full astern signal was given at 0553 and was a double signal or "jingle" which called for emergency power astern. Pilot Daisey also signalled the *Jane McAllister*, which was on the starboard bow, to reverse her engine. The *Atlas* continued her engine full astern until 0555, when the pilot ordered the engine stopped. The rudder remained hard right.

17. At 0556 the *Atlas* grounded. Several bumps were felt at the time of the grounding and noises were heard from the port side aft which resembled that of tearing metal. The grounding took place approximately 100 feet outside the southern (port) limits of the dredged channel at a point about 1,000 to 1,200 feet eastward of the Bayonne Bridge. At the time of the grounding the vessel was canted in the channel at an angle to the shore, with its bow pointed to the center of the Bayonne Bridge.

18. At the time of the grounding, Captain Redden saw wooden piles in the water approximately 50 feet from the ship's port side abeam of the after house.

19. At 0558 the engine of the *Atlas* was put full astern again. Between 0558 and 0600 the *Margaret M. McAllister* returned alongside and ran a line from her bow to a bitt near the port bow of the *Atlas*.

20. Immediately after the grounding the Chief Mate reported that number 8, 9 and 10 port wing tanks were leaking.

21. The *Atlas*, with tugs alongside, passed under the Bayonne Bridge, entered the Bergen Point West Reach and continued on to Linden, New Jersey, without further incident.

22. When the *Atlas* was drydocked, damage was found at the turn of the bilge on the port side beginning at No. 8 port wing tank and running aft to No. 10 port wing tank. Each of the tanks was holed, with ripped frames and longitudinals and the damaged tanks set in.

23. The proximate cause of the grounding of the *Atlas* was the negligence of Pilot Lora Daisey in navigating the vessel out of the channel.

24. There is insufficient evidence to support a finding that the presence of the *Margaret M. McAllister* would have prevented the grounding.

25. The *S.S. Atlas* and its crew responded promptly and accurately to all commands of Pilot Daisey. All the operational and navigational equipment on the *Atlas* was in proper working order. Neither the crew nor the master of the *Atlas* was in any way negligent.

26. The Tug *Jane McAllister* promptly and properly responded to every order of Pilot Daisey. There was no fault, neglect or want of care on the part of the Tug *Jane McAllister* or her master or crew which caused or contributed to the grounding of the *Atlas*.

27. Two tugs are necessary to dock and turn the Atlas and it is customary to have two tugs accompany ships the size of the *Atlas* through the Kills.

28. The Tug *Jane McAllister* is rated at 1,260 horsepower and the *Margaret M. McAllister* at 1,800 horsepower.

II. The Pilotage Clause

29. On November 23, 1958, Mr. Dennis Demets of Cargo and Tankship Management, Inc., agents of the *Atlas*, called a tug dispatcher of McAllister Bros. and requested McAllister Bros. to provide tugs and a pilot to take the *Atlas* from Stapleton Anchorage to the Cities Service Oil

Teaminal at Linden, New Jersey the following day. It was agreed that the tugs together with a pilot would arrive not later than 0500 on November 24, 1958 in order to dock the *Atlas* at Linden by 0730.

30. Demets gave the following information to the McAllister dispatcher: (a) Cargo and Tankship Management, Inc. were the agents for the vessel; (b) The *Atlas* was to be moved from Stapleton Anchorage on November 24 and docked at Cities Service Oil Company Terminal; (c) Approximate draft of the *Atlas* was 32 feet. No specific request for any number of tugs was made.

31. On November 24, 1958, at the completion of the docking operation at Linden, New Jersey, Captain Redden, as Master of the *Atlas*, signed a tug assistance slip which read in pertinent part:

"Date Nov. 24 58

S/S Atlas

For towing from Stapleton

To Cities Service Linden

[more]

	"Arrived	Started	Finished
Names of Tugs Employed			
Margaret Mc	5	5^{10}	8^{45}
Jane Mc	—	—	

***

AM

Certified Correct:

/s/ G. Redden
Master"

Below the master's signature appeared in small print the following:

> "PILOTAGE—When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board such vessel, or any other licensed pilot goes on board such vessel, it is understood and agreed that such tugboat captain or licensed pilot becomes the servant of the owner(s) of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel(s), and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers, operators or managers shall be liable for any damage resulting therefrom.
>
> "With respect to vessels that are not owned by the person or company ordering the tugboat service, it is understood and agreed that such person or company warrants that it has authority to bind the vessel owner to all the provisions of the preceding paragraphs, and agrees to indemnify and hold us harmless, and also those furnishing the tugs and/or pilot, the tugs, their owners, agents, charterers, operators and managers, from all damages and expenses that may be sustained or incurred in the event and in consequence of such person or company not having such authority."

32. On November 28, 1958, MacAllister Bros. submitted a bill to Cargo and Tankship Management for the services rendered the *Atlas* on November 24, 1958 in the amount of $562.17. At the bottom of the bill, after the amounts, appeared the pilotage clause quoted in Finding of Fact No. 31. The bill was paid by Cargo and Tankship Management.

33. On November 12, 1958 and November 13, 1958, Captain Redden signed tug assistance slips for services rendered to the *Atlas* on a prior voyage to New York Harbor. Both the tug assistance slips and the bills subsequently rendered by McAllister Bros. to Cargo and Tankship Man-

agement were on the same form as that described in Findings Nos. 31 and 32. (Lib. Ex. 1, Attach. E, F, G and H) The bills were paid by Cargo and Tankship Management, Inc.

34. Captain Redden did not read the pilotage clause on any of these occasions nor know of its content.

35. Cargo and Tankship Management, Inc. were also agents of the owners of the vessel *S.S. Captain Nicholas Sitinas.* On both the inbound voyage of the *Sitinas* on September 2 and the outbound voyage on September 5, McAllister Bros. provided tugs and a pilot. On both occasions the master signed tug assistance slips on the same form as that quoted in Finding No. 31. Lib. Ex. 1, Attach. A and B.) The bills subsequently rendered to and paid by Cargo and Tankship Management, Inc. were the same in form as that described in Finding No. 32.

36. The bills rendered by McAllister Bros. to Cargo and Tankship Management, Inc. for services to the *Atlas* and *S.S. Captain Nicholas Sitinas* were based upon the McAllister Bros. Rate Schedule of April 16, 1957. (Lib. Ex. 1, Attach. K.) The pilotage clause quoted in Finding No. 31 is on the reverse side of the schedule. There is no evidence to indicate that Cargo and Tankship Management, Inc. ever had in its possession the McAllister Bros. Rate Schedule.

37. Subsequent to the grounding of the *Atlas* and for a period of several years, McAllister rendered bills to Cargo and Tankship Management, Inc. for towage services. Those towage bills contained the pilotage clause as did the tug assistance slips annexed to the bills. Cargo and Tankship Management, Inc. paid bills rendered by McAllister until Cargo & Tankship Management, Inc. became insolvent.

Opinion, Findings of Fact and Conclusions of Law of District Court

DISCUSSION

I.

The proximate cause of the grounding was the negligent navigation of Pilot Lora Daisey. The radar on the bridge of the *Atlas*, certainly a reliable navigational aid, indicated that the vessel was close to the port shore. The pilot chose not to view the radar screen, apparently preferring to rely on landmarks familiar to him but invisible in the fog. The master of the vessel, Captain Redden, who did view the radar, observed that the vessel was rather close to the port shore. He communicated this to the pilot on several occasions prior to the grounding. Yet, in spite of these warnings, the pilot gave rudder commands which would have tended to move the vessel closer to the port shore. When the danger was finally brought home to him, he immediately ordered an emergency full astern and a hard right rudder. Almost immediately thereafter the vessel grounded at a point 100 feet outside the southern limits of the channel. It is difficult to avoid the conclusion that the proximate cause of the grounding was that the vessel was negligently navigated beyond the limits of the channel.

To conclude, as the libellant urges, that the absence on the port bow of the Tug *Margaret M. McAllister* was the proximate cause of the grounding is far too speculative. The argument is two-fold: First, the presence of the tug would have given an extra pair of eyes to see the danger and, second, the additional tug would have given extra power to extricate the vessel from its danger after the pilot realized his position.

With respect to the first contention, it must not be forgotten that had the pilot heeded the information afforded him by either the radar or the master he would have fully realized the predicament in which he had placed the vessel. All the tug could have done with respect to any informational function would have been to confirm what was readily available on the bridge of the vessel had the pilot only

chosen to utilize it. It is difficult to see how the radar aboard the *Margaret M. McAllister* could have been of any assistance, as the testimony is undisputed that its radar was not placed in use until after the *Atlas* was docked at Linden. (Lib. Ex. 7, p. 88) There is no indication that the pilot would have any more heeded information from the port tug than from the master of the *Atlas*.

The second argument is similarly far too speculative. Captain Redden himself admitted that the extra tug might have lessened the damage to the vessel but could not have prevented the *Atlas* from at least touching the shore. (Lib. Ex. 2, pp. 16, 34) His testimony with respect to the extra power which could have been furnished by the tug on the port bow was less than conclusive: "I think that if the tug had been there, it would have given Captain Daisey much more confidence in the situation, even though he realized then that we were completely out of the channel." (id. at 15) The testimony of the Second Mate, D. Kloss, was that the port tug, had it been present, "could easily have pushed the stern away from that danger point when it was—when Capt. Redden first notified Capt. Daisey that we are getting too close to the south shore" (Lib. Ex. 3, p. 24). But as the Findings indicate, the pilot did not heed the early warning of Capain Redden and there is no indication that he would have, whether there was or was not a tug on the port bow.

It is true that the libellant's expert witness, Captain Buck, whose qualifications are not to be questioned, testified that in his opinion the grounding would not have occurred had the tug on the port bow been present (Tr. 17): "I think if that tug was on the port bow, I think it would have been avoided." However, this is not akin to stating that the absence of the tug was the proximate cause of the grounding. At best, his testimony, taken as a whole, is simply that had the tug been present the pilot could have, perhaps successfully, extricated the vessel from its predicament—a conclusion heretofore ruled too speculative. To the extent

that there is any conflict between this testimony and that of Captain Redden, I shall choose to rely on Redden's testimony because of his presence on the bridge at the time of the grounding.

The position of a judge sitting in the cloistered silence of his chambers when compared with that of a pilot on the bridge of a fog-enshrounded vessel in a narrow channel necessarily cautions restraint in order to prevent too hastily finding fault with an experienced pilot. Forced as I am to determine the cause of the grounding, however, it is my judgment that it was proximately caused by the negligence of the pilot Lora Daisey.

I make this finding fully aware that the evidence establishes that it was the customary practice to have two tugs accompany vessels the size of the *Atlas* through the Kills. See, e.g., Lib. Ex. 12, No. 73; Lib. Ex. 2, p. 12; Buck testimony, p. 11; Lib. Ex. 6, p. 53; Lib. Ex. 7, p. 98. Even were I to assume that the contract between the parties required two tugs and that the respondent breached the contract, I would be required to find that the breach was not the proximate cause of the grounding. One would be hard pressed to say that it was the height of wisdom for the pilot to let the Tug *Margaret M. McAllister* take leave of the vessel. But the grounding occurred for one simple reason: The vessel was negligently navigated out of the channel. This case is far different from the case where the vessel is forced from the channel by either tide or wind because of insufficient tug power. Compare *Transpacific Carriers Corp.* v. *Tug Ellen F. McAllister*, 209 F. Supp. 870 (S.D.N.Y. 1962). All indications are that the vessel could have successfully negotiated the channel with a single tug had it only not strayed beyond the channel limits. There is no occasion in the present case to find any concurrent proximate causes, thus obviating any consideration of an apportionment of damages among those mutually at fault. See, e.g., *George W. Rogers Constr. Co.* v. *United States*, 118 F. Supp. 927 (S.D.N.Y. 1954).

The respondent urges that the master of the *Atlas* was negligent in failing to rectify the errors of the pilot. Certainly, a master has not only the right, but also the duty, of relieving the pilot and taking charge of the vessel when he apprehended a situation of imminent danger to the vessel. *Union Shipping & Trading Co.* v. *United States,* 127 F. 2d 771, 775 (2d Cir. 1942); *Robins Dry Dock & Repair Co.* v. *Narigazione Libera Triestina, S.A.,* 32 F. 2d 209 (2d Cir. 1929); Griffin, Collision § 190 (1949). "While the pilot doubtless supersedes the master for the time being in command and navigation of the ship, and his orders must be obeyed in all matters connected with her navigation, the master is not wholly absolved from his duties while the pilot is on board, and may advise with him, and even displace him in case he is intoxicated or manifestly incompetent." The *Oregon,* 158 U. S. 186, 194 (1895). However, this duty must be balanced against the very purpose for which the pilot occupies his position on the bridge. "* * * [A] pilot is engaged to navigate because of his experience in handling ships, and his special knowledge of the waters and local navigating conditions. He is supposed to have enough foresight to avoid [groundings]. He holds his rank and rating because he is considered expert enough to act promptly and rightly *in extremis.*" *George W. Rogers Constr. Co.* v. *United States,* 118 F. Supp. 927, 930 (S.D.N.Y. 1954). "As a rule no employer, no person, can tell them how to perform their pilotage duties." *Bisso* v. *Inland Waterways Corp.,* 349 U.S. 85, 94 (1955).

In this case, Captain Redden on several occasions informed the Pilot Daisey that the vessel was close to the port shore. When Pilot Daisey gave first an easy left and then a hard left rudder, the Captain became concerned and so did Pilot Daisey. Within a space of 30 seconds, the commands of hard right and full astern were given, with the pilot expressing the fond wish: "I just hope she don't fetch up." (Lib. Ex. R-8, p. 34) There is no indication that the master could have done more than the pilot at that

time or that the danger was so imminent prior to these rudder commands as to warrant the master in acting. The pilot was certainly more familiar with the Kills than Captain Redden. It would have been less than wise for Captain Redden to have assumed command of a fully laden vessel in a narrow, unfamiliar channel with the visibility limited to less than 250 feet. When the time of obvious danger arrived, the pilot himself acted. There is here nothing to indicate that the master was in any respect negligent in failing to relieve Pilot Daisey. Compare *Pennsylvania R.R.* v. *The Beatrice,* 275 F. 2d 209 (2d Cir. 1960) and *Robins Dry Dock & Repair Co., supra,* with *Park S.S. Co.* v. *Cities Service Oil Co.*, 185 F. 2d 804 (2d Cir.), cert. denied 342 U.S. 862 (1951) and *Union Shipping & Trading Co., supra.*

Since I have found there was no fault, neglect or want of care on the part of either the Tug *Jane McAllister* or the Tug *Margaret M. McAllister* (see Finding of Fact Nos. 24 and 26), neither is liable in rem. "* * * [W]hen the 'assisted vessel' is under her own power and the towing company merely supplies a tug master as a pilot, there is no maritime lien upon the tug for the errors of the pilot * * *." *Sun Oil Co.* v. *Dalzell Towing Co.*, 55 F. 2d 63, 65 (2d Cir.), aff'd on other grounds 287 U.S. 291 (1932). See also *Logue Stevedoring Corp.* v. *The Dalzellance,* 198 F. 2d 369 (2d Cir. 1952).

II.

The respondent McAllister Bros. seeks to avoid liability for the acts of Pilot Daisey on the basis of the following pilotage clause which it alleges is part of the contract between these parties:

> "PILOTAGE—When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board such vessel, or any other licensed pilot goes on board such vessel, it is under-

stood and agreed that such tugboat captain or licensed pilot becomes the servant of the owner(s) of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel(s), and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers, operators or managers shall be liable for any damage resulting therefrom.

"With respect to vessels that are not owned by the person or company ordering the tugboat service, it is understood and agreed that such person or company warrants that it has authority to bind the vessel owner to all the provisions of the preceding paragraphs, and agrees to indemnify and hold us harmless, and also those furnishing the tugs and/or pilot, the tugs, their owners, agents, charterers, operators and managers, from all damages and expenses that may be sustained or incurred in the event and in consequence of such person or company not having such authority."

The contract between the libellant and the respondent McAllister Bros. governing the services to the *Atlas* on November 24, 1958 arose from the telephone call by Mr. Demets to the McAllister dispatcher on the preceding day requesting tug assistance and a pilot to dock the vessel at Linden, New Jersey. "The contract was oral, and, as is usual in towage cases, consisted merely of an order telephoned by the tow owner and accepted by the tug owner, so that the full terms of the contract must be spelled out by the court from the previous dealings of the parties." *Sun Oil Co.* v. *Dalzell Towing Co.*, 55 F. 2d 63, 64 (2d Cir.), aff'd 287 U.S. 291 (1932). The crucial question then becomes whether the prior dealings between the ship's agent and McAllister Bros. were such as to make the pilotage clause part of their understanding.

The prior dealings relied upon by the respondent consisted entirely of five instances in which the ship's agent received McAllister Bros. invoices with the pilotage printed

at the foot and the signing by the masters of various vessels for which Cargo & Tankship Management was agent of five tug assistance slips with the pilotage clause printed below their signatures. It should be noted at the outset that the contract crucial to this case was largely made by the telephone call on November 23, 1958. While the signing of the tug assistance slip on November 24 and the rendering of the bill on November 28 are material in determining the terms of that contract, it is difficult to see how the events after the payment of the November 28 bill are in any respect material. Thus, the facts set forth in Finding No. 37 are immaterial in determining what the understanding of the parties was on November 23, 1958.

A comparison of some of the cases in which the pilotage clause has been held to govern the rights of the parties forcefully indicates the unsubstantiality of the five instances relied upon by the respondent. There is here no formal contract between the parties containing the pilotage clause as there was in *Patterson Terminals Inc.* v. *S.S. Johannes Frans*, 209 F. Supp. 705 (E.D.Pa. 1962); *Farrell Lines* v. *S. S. Birkenstein*, 207 F. Supp. 500 (S.D.N.Y. 1962); *International Terminal Operating Co.* v. *Naviera Aznar, S.A.*, 198 F. Supp. 214 (S.D.N.Y. 1961); *Grace Line, Inc.* v. *The C. Hayward Meseck*, 150 F. Supp. 425 (S.D.N.Y.) aff'd per curiam 248 F. 2d 736 (2d Cir. 1957); *New Jersey Bell Telephone Co.* v. *Standard Oil Co.*, 88 F. Supp. 806 (S.D.N.Y. 1949); *Pacific-Atlantic S.S. Co.* v. *The Tower Grange*, 80 F. Supp. 461 (D.Md. 1948).

Nor is there any evidence of prior discussions between the parties in which the pilotage clause was asserted or the settlement of any prior claims based on the pilotage clause as there was in *Transpacific Carriers Corp.* v. *Tug Ellen F. McAllister*, 209 F. Supp. 870 (S.D.N.Y. 1962). Nor is there any evidence that the ship's agent was in receipt of the rate schedule containing the pilotage clause as there was in *George W. Rogers Constr. Co.* v. *United States*, 118 F. Supp. 927 (S.D.N.Y. 1954); *United States Gypsum*

Co. v. *Curtis Bay Towing Co.*, 1953 A.M.C. 2071 (E.D.Va. 1953); *The West Eldara*, 101 F. 2d 45 (2d Cir.), cert. denied sub nom. *McAllister Towing & Transp. Co.* v. *American Diamond Lines, Inc.*, 308 U.S. 607 (1939). *Cf. Calzavaro* v. *Planet S.S. Co.*, 31 F. 2d 885 (4th Cir. 1929), or any evidence that the agent checked the charge against the rate schedule as in *Transpacific Carriers, supra.* Nor is there any evidence of any attempt to call special attention to the pilotage clause as in *Sun Oil Co.* v. *Dalzell Towing Co.*, 55 F. 2d 63 (2d Cir.), aff'd 287 U.S. 291 (1932); *G. Robitzek & Bro. Inc.* v. *Davis*, 296 Fed. 107 (2d Cir. 1923); *Ten Eyck* v. *Director*, 267 Fed. 974 (2d Cir.), cert. denied 254 U.S. 646 (1920); *Cf. McWilliams Bros. Inc.* v. *Davis*, 285 Fed. 312 (2d Cir. 1922). Nor is there any evidence of any exchange of correspondence relating to the pilotage clause as in *The Cutchogue*, 10 F. 2d 671 (2d Cir.), cert. denied 273 U.S. 703 (1926); *The Oceanica*, 170 Fed. 893 (2d Cir.), cert. denied 215 U.S. 599 (1909), or any evidence tending to establish a custom in the Port of New York that all tugboat companies incorporated the pilotage clause in their contracts as there was in *The West Eldara, supra.*

The burden is upon the respondent McAllister Bros. to establish by a fair preponderance of the credible evidence that the pilotage clause was part of the contract between these parties. *G. Robitzek & Bro. Inc.* v. *Davis*, 296 Fed. 107 (2d Cir. 1923); *The Gulf Maracaibo*, 75 F. Supp. 20 (E.D.N.Y. 1947). It has failed to carry that burden. "[P]rovisions for exemption are closely scrutinized by courts and doubts either as to the existence of the provision of exemption or its scope are resolved against relief from responsibility." *Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85, 100 (1955) (Frankfurter, J., dissenting).

For failing to sustain its burden, the respondent McAllister Bros. stands liable to the libellant for the damage proximately caused by the negligence of its employee, Lora Daisey.

Opinion, Findings of Fact and Conclusions of Law of District Court

CONCLUSIONS OF LAW

1. The court has jurisdiction of the subject matter of this suit and of the libellant, Tankers & Tramps Corporation, and the respondents, McAllister Bros., Inc. and the Tugs *Jane McAllister* and *Margaret M. McAllister*.

2. The libel is dismissed as against the respondent Lora Daisey without prejudice for failure to effectuate valid service of process.

3. The libel in rem against the Tug *Jane McAllister* is dismissed for failure of the libellant to prove any fault, neglect or want of care on the part of the tug or her master or crew which caused or contributed to the damage of the SS. *Atlas*. *Sun Oil Co.* v. *Dalzell Towing Co.*, 55 F. 2d 63 (2d Cir.), aff'd 287 U.S. 291 (1932).

4. The libel in rem against the Tug *Margaret M. McAllister* is dismissed for failure of the libellant to prove that any fault, neglect or want of care on the part of the tug or her master or crew was the proximate cause of the damage to the SS. *Atlas Sun Oil Co., supra.*

5. The proximate cause of the damage to the SS *Atlas* was the negligent navigation of the Pilot Lora Daisey.

6. The respondent McAllister Bros., Inc. has failed to prove by a fair prepondereance of the credible evidence that the pilotage clause was part of the contract between the libellant and the respondent McAllister Bros., Inc. on November 24, 1958.

7. The respondent McAllister Bros., Inc. is liable to the libellant for the damage to the SS *Atlas* proximately caused by the negligence of McAllister's employee, Lora Daisey.

8. Libellant is entitled to an interlocutory decree sustaining its claim for liability against the respondent McAllister Bros., Inc. in personam.

9. The libellant is entitled to a provision in the interlocutory decree providing for the reference to a Commissioner of the damages to which it is entitled with the question of costs and interest to await the entry of the final decree.

Submit interlocutory decree on notice in accordance with the foregoing.

Dated: New York, N. Y.
July 8, 1964.

RICHARD H. LEVET
United States District Judge.

Opinion of United States Court of Appeals For the Second Circuit

No. 270—September Term, 1965.

(Argued March 10, 1966 Decided April 18, 1966.)

Docket No. 29254

TANKERS AND TRAMPS CORPORATION,
Libellant-Appellee-Cross-Appellant,

v.

Tugs JANE MCALLISTER and MARGARET M. MCALLISTER, their engines, boilers, etc., MCALLISTER BROTHERS, INC.,
Respondent-Appellant-Cross Appellee,

and

PILOT L. DAISEY,
Respondent-Appellee.

Before:

SMITH, HAYS and ANDERSON,
Circuit Judges.

Appeal and cross appeal from interlocutory decree in the admiralty in the United States District Court for the Southern District of New York, Richard H. Levet, *District Judge,* holding McAllister Brothers, Inc. liable for damages due to grounding of SS Atlas in the Kill van Kull, dismissing for failure to prove fault the action *in rem* against

the Tugs Jane and Margaret M. McAllister, and dismissing without prejudice, for lack of valid service of process, the action against Pilot Daisey. Affirmed.

CHRISTOPHER E. HECKMAN, New York, N. Y., (John H. Hanrahan, and Foley & Martin, New York, N. Y., on the brief), *for respondent-appellant.*

THEODORE P. DALY, New York, N. Y. (Melvin J. Tublin, and Poles, Tublin & Patestides, New York, N. Y., on the brief), *for libellant-appellee.*

SMITH, *Circuit Judge*:

The United States District Court for the Southern District of New York, Richard H. Levet, *District Judge*, sitting in admiralty, entered an interlocutory decree holding liable McAllister Brothers, Inc., which furnished two tugs and a pilot to assist libelant's tanker SS Atlas, for damages to the tanker due to grounding in the Kill van Kull, on a voyage from Stapleton anchorage to a terminal at Linden, New Jersey on the morning of November 24, 1958. The court found that the grounding was causeed by pilot error, held McAllister as employer of the pilot, exonerated the tugs and dismissed as to pilot Daisey, who had not been served with process. McAllister Brothers, Inc. appeals from the decree against it and libelant appeals from the decree so far as it dismissed the action against the Tug Margaret M. McAllister. We find no error and affirm the decree.

There is no doubt that the grounding and resultant damage to the Atlas were due to the negligence of Daisey who

navigated the Atlas out of the travelled portion of the channel and onto the mud bank outside the channel in spite of repeated warnings by the Master of the Atlas on radar observation that he was getting too far to port. Nor is there any question but that Daisey was furnished as a pilot by McAllister and had been in McAllister's employ as a pilot for some 14 years. He was paid a salary by McAllister and a fee by Cargo and Tankship, agent for SS Atlas. McAllister's claim of non-liability depends on the provisions of a New York Harbor Pilotage Clause,[1] which, if applicable would make the pilot furnished by the tug owner the employee of the vessel (Atlas) or its owners, and make it or them liable for his negligence.

The towage and pilotage in question were arranged the day prior to the grounding by telephone communication between Cargo and Tankship Management, the agent for the SS Atlas, and McAllister's tug dispatcher. Nothing was said in that conversation with regard to the New York Harbor Pioltage Clause or any similar limitation of McAllister's liability. There was nothing said, so far as ap-

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[1] PILOTAGE—When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board such vessel, or any other licensed pilot goes on board such vessel, it is understood and agreed that such tugboat captain or licensed pilot becomes the servant of the owner(s) of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel(s), and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers, operators or managers shall be liable for any damage resulting therefrom.

With respect to vessels that are not owned by the person or company ordering the tugboat service, it is understood and agreed that such person or company warrants that it has authority to bind the vessel owner to all the provisions of the preceding paragraphs, and agrees to indemnify and hold us harmless, and also those furnishing the tugs and/or pilot, the tugs, their owners, agents, charterers, operators and managers, from all damages and expenses that may be sustained or incurred in the event and in consequence of such person or company not having such authority.

pears, which made the pilot subject to the direction of Tankers and Tramps as to the manner in which he should carry out his piloting duties.

The "pilotage clause" was, however, included below the signature line on the tug assistance slip or receipt signed by Atlas' master after the grounding. It appeared likewise on the bill rendered Atlas' agent for tug assistance, and paid by it, and appeared on a rate schedule in use by McAllister at the time. There was no evidence that libelant or Atlas' agent saw the printed schedule prior to the grounding. There was evidence that Atlas' agent had paid bills on which the clause was printed for services of McAllister to another vessel and for Atlas on one earlier voyage. There was no evidence that any claims had arisen because of pilot error on those voyages or that the clause had been discussed. There was no master contract in existence covering all tug assistance rendered libelant by McAllister.

A contract arose from the telephone conversation calling for the furnishing of the services. This is so even though there was no price specified, for a reasonable price was implied and the services were furnished. Williston on Contracts, 3rd Ed. Vol. 1, Sec. 41. Since the contract was complete at the time of the telephone conversation, the pilotage clause can defeat libelant's claim only if it was part of that contract, or if it was later agreed to in some subsequent addition to or substitution for the original contract. If prior dealings between the parties involving the clause were proved, an inference that it was a term of this contract might be justified. *Sun Oil Co.* v. *Dalzell Towing Co.*, 55 F. 2d 63, 64 (2 Cir.), aff'd 287 U. S. 291 (1932). The proof of such prior dealings as would justify such an inference is, however, lacking here. To be sure, there are circumstances which indicate that such a restrictive clause has

been in use at times in the trade. The title of the clause, reference to it in a number of other cases, McAllister's printing of it on schedules, tug assistance slips and bills, all show that it has been utilized in such contracts, perhaps with some frequency in the trade in this harbor.[2] There was, however, no testimony that there was in fact use with such frequency as to justify a finding that such a transfer of liability was a custom in the trade, or in what percentage of New York Harbor towage contracts such a provision was included, or what knowledge Tankers had of any such custom. On the bill a 7½% discount is referred to. But there is no testimony or other evidence of any connection between the discount and the pilotage clause. Lacking any evidence that there was any custom or that McAllister's schedule was ever brought to libelant's attention and crediting testimony that no mention was ever made of such a limitation in the contract negotiations, the court declined to interpret the contract as containing such a limitation. In this the court was justified. An independent contractor agreeing to provide a pilot and assisting tugs to bring a ship to dock in waters familiar to the contractor normally assumes charge of and full responsibility for the job. *The West Eldara,* 104 F. 2d 670, 671 (2 Cir. 1939). It was open to McAllister readily to prove a custom of the trade absolving such a contractor if it did in fact exist and if Tankers had knowledge of it.

To be sure, the master signed a tug assistance slip and Atlas' agent paid a bill for the services, both having printed

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[2] Compare *The West Eldara,* 101 F. 2d 45 (2 Cir.), cert. den. sub nom. *McAllister Towing & Tr. Co.* v. *American Diamond Lines, Inc.,* 308 U. S. 607 (1939), modified on rehearing 104 F. 2d 670, 671 (2 Cir. 1939), in which the charterer was shown to be in possession of the towage schedule containing the pilotage clause, but the master was not shown to have knowledge of a custom to include the clause in docking agreements so as to bind the owner.

at the foot the pilotage clause. But the master was confirming the date and time of the tugs' assistance, and denied he read the printing at the foot of the form, and there is no evidence that any responsible employee or officer of the agent did so. And, while it is true that one may in some circumstances by paying a bill liquidate the amount of consideration not already specifically agreed upon, *Fuller* v. *Kemp,* 138 N. Y. 231, mere payment of the amount of a bill with a new major limitation on the terms of the contract appended thereto does not demonstrate agreement to the limitation as a modification of the original contract, under the circumstances shown here. Intention to agree to so important a revision, without consideration, accepting responsibility for heavy damages, after the grounding had taken place, was surely not likely.

Much is made of the fact that similar language was similarly placed in slips signed and bills paid by Cargo and Tankship for another vessel and for an immediately prior arrival and departure of Atlas. But, aside from the question in the case of the other vessel whether the agent's knowledge acquired outside the agency could bind its principal here, there is nothing to show that any discussion was had of the provision, or that claims were made under it, or that it was specifically brought to the attention of the agent with respect to the telephoned communications which formed the contract here, or, as noted above, that any custom of the port or of the trade made such a provision universally understood to constitute a part of such contracts of towage and pilotage.

In this state of the record, we cannot say that it was clearly erroneous for the court to find that the respondent McAllister had failed to establish that the pilotage liability clause was part of the contract between the parties as origi-

nally entered into. *McAllister* v. *United States*, 348 U. S. 19, 20 (1954).

Nor was it clear error to hold that the payment of the bill by Cargo and Tankship, in the light of the failure to show any discussion of the clause appended thereto either in this case or the four earlier instances shown amounted either to a new and additional contract on behalf of Tankers and Tramps to waive claim for liability for the grounding, or sufficient evidence of intent at the time of the oral contract to be then bound by such an unexpressed waiver.

The cross appeal is equally without merit. Counsel merely speculated that the presence of the second tug would have prevented the grounding; and the trial court's conclusion that the negligent navigation by the pilot was the proximate cause of the damage to the tanker is fully justified by the facts and the evidence supporting them. See *Compania Maritima S. L.* v. *Moran Towing & Transp. Co.*, 197 F. 2d 607, 609 (2 Cir. 1952).

HAYS, *Circuit Judge* (dissenting):

On November 23, 1958, Cargo & Tankship Management Corporation, agents for the vessel *Atlas*, telephoned McAllister Brothers, Inc. and requested them to provide tugs and furnish a pilot so that the *Atlas* could dock at Linden, New Jersey on the following morning. The district court found that the *Atlas* went aground and sustained considerable damage as a result of the negligence of the pilot provided by McAllister.

Appellant, McAllister Brothers, Inc., sends tugs and licensed pilots to assist vessels in docking in the port of New York. As in *Sun Oil Co.* v. *Dalzell Towing Co.*, 55 F. 2d 63, 64 (2d Cir.), aff'd, 287 U. S. 291 (1932), so in this case, "the contract was oral, and, as is usual in towage cases,

consisted merely of an order telephoned . . . [by appellee's agent to appellant], so that the full terms of the contract must be spelled out by the court from the previous dealings of the parties."

On at least four previous occasions Cargo and Tankship had received and paid bills from McAllister containing the following clause:

> "Pilotage—When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power, goes on board said vessel or any other licensed pilot goes on board such vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owner of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tug and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom."

On two occasions prior to the accident, viz., on November 12 and 13, 1958, the master of the *Atlas* had signed a slip containing the pilotage clause, and the appellant's bill for services also containing that clause was paid by Cargo and Tankship. There is nothing in the record to indicate that appellee's agent ever objected to the pilotage clause or asserted that it was not applicable to them.

This history of prior dealings is enough to establish that the parties intended the pilotage clause to be incorporated into the oral contract.

After the *Atlas* had gone aground, the master of the vessel signed a tug assistance slip containing the pilotage clause and Cargo and Tankship paid a bill for services

containing the clause. The costly accident must surely have directed the attention of appellees to the question of liability and therefore to the pilotage clause with which they were without doubt already familiar. Without commenting upon or protesting about the pilotage clause, the master signed the slip and the appellees paid the bill. The slip and the bill both contained the terms and conditions of the contract into which the appellees entered by signing.

I must respectfully dissent.

Judgment of United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of April, one thousand nine hundred and sixty-six.

Present:

HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
Circuit Judges.

TANKERS and TRAMPS CORPORATION,
Libellant-Appellant,

v.

Tug JANE McALLISTER, and PILOT L. DAISEY,
Respondents,

McALLISTER BROTHERS, INC.,
Respondent-Appellant,

Tug MARGARET McALLISTER, her engines, boilers, etc.,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs to the libellant appellant Tankers and Tramps Corporation.

A. DANIEL FUSARO,
Clerk

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

TANKERS and TRAMPS CORPORATION,
Libellant-Appellee-Cross-Appellant,

v.

Tugs JANE McALLISTER and MARGARET M. McALLISTER, their engines, boilers, etc., McALLISTER BROTHERS, INC.,
Respondent-Appellant-Cross-Appellee,

and

PILOT L. DAISEY,
Respondent-Appellee.

FOLEY & MARTIN, New York, New York, for respondent-appellant-cross-appellee.

Treating this "Petition for Rehearing in Banc" as one seeking reconsideration by the panel pursuant to Rule 25(b) of the rules of this court, and as suggesting, if that is denied, reconsideration in banc, petition, denied. The suggestion for rehearing in banc will be transmitted to the Chief Judge for submission to all active judges. See In re Grand Jury Investigation of Violations, 318 F. 2d 533, 536 (2 Cir.), cert. dismissed 375 U. S. 802 (1963).

J J S.
P. R. H.
R. P. A.
U. S. C. JJ.

June 21, 1966.

Order Denying Petition for Rehearing in Banc

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

TANKERS and TRAMPS CORPORATION,
Libellant-Appellee-Cross-Appellant,

v.

Tugs JANE McALLISTER and MARGARET M. McALLISTER, their engines, boilers, etc., McALLISTER BROTHERS, INC.,
Respondent-Appellant-Cross-Appellee,

and

PILOT L. DAISEY,
Respondent-Appellee.

—o—

FOLEY & MARTIN, New York, New York, for respondent-appellant-cross-appellee.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD,
Chief Judge.

21 June 1966.

Order Denying Supplemental Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

TANKERS and TRAMPS CORPORATION,
Libellant-Appellee-Cross-Appellant,

v.

Tugs JANE McALLISTER and MARGARET M. McALLISTER, their engines, boilers, etc., McALLISTER BROTHERS, INC.,
Respondent-Appellant-Cross-Appellee,

and

PILOT L. DAISEY,
Respondent-Appellee.

FOLEY & MARTIN, New York, New York, for respondent-appellant-cross-appellee.

Petition denied. See order denying original petition of May 2, 1966 and denied this date.

J. J. S.
P. R. H.
R. P. A.
U. S. C. JJ.

June 21, 1966

Order Denying Supplemental Petition for Rehearing in Banc

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

TANKERS and TRAMPS CORPORATION,
Libellant-Appellee-Cross-Appellant,

v.

Tugs JANE McALLISTER and MARGARET M. McALLISTER, their engines, boilers, etc., McALLISTER BROTHERS, INC.,
Respondent-Appellant-Cross-Appellee,

and

PILOT L. DAISEY,
Respondent-Appellee.

FOLEY & MARTIN, New York, New York, for respondent-appellant-cross-appellee.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD,
Chief Judge

June 21, 1966

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1966

No. 553

MCALLISTER BROTHERS INC.,

Petitioner,

—against—

TANKERS AND TRAMPS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

MELVIN J. TUBLIN
Counsel for Respondent
37 Wall Street
New York, New York 10005

POLES, TUBLIN, PATESTIDES
& STRATAKIS
THEODORE P. DALY
of Counsel

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 553

MCALLISTER BROTHERS INC.,

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TANKERS AND TRAMPS CORPORATION,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Statement

The petitioner seeks review of a judgment of the United States Court of Appeals for the Second Circuit (A. 29a),* affirming the decree in favor of the respondent made and entered in the United States District Court for the Southern District of New York. A petition and supplemental petition filed by the petitioner in the Court of Appeals to obtain rehearing "in banc" were denied (A. 31a-33a).

This is an action by the respondent as Owner of the S.S. ATLAS for serious damage which resulted from the grounding of the vessel in Kill Van Kull in New York

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* All references are to petitioner's Appendix.

Harbor on November 24, 1958 while the vessel was being piloted by an employee of the petitioner on a trip from anchorage at Stapleton, Staten Island to Linden, New Jersey. The District Court found that the grounding occurred because the pilot had negligently navigated the ATLAS out of the channel in Kill Van Kull during a period of low visibility in fog (A. 12a). The Court held the petitioner liable for its employee's negligence (A. 18a).

At the time of the grounding, the ATLAS was being assisted by one of the petitioner's tugs. Some minutes before the grounding, during a period of good visibility, another of the petitioner's tugs had been assisting the ATLAS, but the more powerful of the two tugs abandoned the ATLAS to bring one of the petitioner's employees ashore solely for the business purposes of the petitioner (A. 4a). The District Court found that it was customary practice in Kill Van Kull for the employment of two tugs to handle vessels of the ATLAS' size, but concluded that pilot negligence rather than absence of the tug was the proximate cause of the grounding (A. 12a). The respondent paid for the services of the pilot and two tugs furnished by the petitioner (A. 8a).

On the day preceding the grounding, the respondent's agent, Cargo and Tankship Management, Inc., had telephoned the petitioner's tug-dispatcher requesting the petitioner to furnish tugs and a pilot the following morning to assist the ATLAS from anchorage at Stapleton, Staten Island to Linden, New Jersey (A. 6a-7a). No mention or reference to any limitation or exemption of the petitioner from liability for the actions of its pilots or tugs was made in the course of this telephone conversation (A. 22a).

The petitioner admits that the negligence of its pilot-employee caused the grounding of the ATLAS. However, in order to escape liability for its employee's negligence, the petitioner urged that the oral contract, that is, the telephone conversation between the respondent's agent and the petitioner's tug-dispatcher, was subject to a "pilotage clause" purporting to make any pilot furnished by the petitioner the servant of the respondent. The petitioner urged that this exculpatory language was to be found on a form time-receipt which the petitioner employed solely to obtain an acknowledgment from Masters of vessels confirming the length of time its tugs were employed. This form time-receipt is also called a "tug assistance slip" (A. 9a). This exculpatory language also appears on the form of invoice later submitted by the petitioner in billing for the services of the tugs.

The petitioner, contrary to the finding of the Court, states in its petition at pages 3 and 4 that the "pilotage clause" appears in "bold print" on the above-mentioned forms. The District Court found that the exculpatory language was "in small print" appearing at the bottom of each paper, below the Master's signature on the tug assistance slip and below the amounts on the invoice (A. 8a).

The petitioner, in its attempt to absolve itself from liability for its employee's negligence, produced no evidence purporting to be contractual in nature linking the petitioner with the "pilotage clause." The petitioner had performed towing services for the respondent's agent on a few prior occasions using the form of time-receipt and invoice described above. Two of these occasions involved towing services provided by the petitioner for the ATLAS, but there was no evidence concerning any dealings between

the parties with respect to the "pilotage clause" (A. 15a, 25a).

The petitioner also urged that the "tug assistance slip" which was presented to and signed by the Master of the ATLAS upon the completion of the pilotage following the grounding, and the invoice for the towing services performed by the petitioner on that occasion which was later paid by the agent for the respondent, served to absolve the petitioner from liability. The petitioner argued that the signing of the time-receipt and the subsequent payment of the invoice in the amount of $562.17 constituted a "release" or "accord and satisfaction" of the grounding damages which were in excess of a quarter of a million dollars.*

The Trial Court found as fact that:

1. there was no evidence of prior discussions between the parties in which the "pilotage clause" was asserted or any settlement of prior claims based on the "pilotage clause" (A. 16a);

2. nor was there any evidence that the ship's agent was in receipt of any "rate schedule" containing the "pilotage clause" (A. 16a);

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* Subsequent to the filing of the District Court's "Opinion, Findings of Fact and Conclusions of Law" on July 8, 1964, the petitioner moved for re-argument in the District Court asserting, for the first time, that the time-receipt signed by the Master of the ATLAS after the grounding and the invoice paid by the agent for the respondent after the grounding operated as a "release" or "accord and satisfaction" for the damages caused by the grounding. That motion was denied. Prior to the filing of the Opinion of the District Court, the petitioner relied solely upon the alleged "previous dealings" as serving to incorporate the "pilotage clause" in the subsequent oral contract (A. 15a).

3. nor was there any evidence that the ship's agent checked the charges for the tugs as stated in the invoice against any "rate schedule" (A. 17a);

4. nor was there any evidence of an attempt to call the respondent's attention to the "pilotage clause" (A. 17a);

5. nor was there any evidence of any exchange of correspondence relating to the "pilotage clause" (A. 17a);

6. nor was there any evidence attempting to establish any custom that all tugboat companies incorporated the "pilotage clause" in their contracts in the Port of New York (A. 17a).

The petitioner erroneously states at page 5 of its petition that the "rate schedule" was "circulated", but there is no evidence of this and the Trial Court affirmatively found that there was no evidence that the ship's agent was in receipt of the rate schedule containing the pilotage clause (A. 16a).

The District Court affirmatively found that the Master of the ATLAS had signed a time-receipt acknowledging the performance of towing services by the petitioner's tugs during stated times, but had not read the "pilotage clause" which appeared "in small print" below his signature and was not aware of the contents of this "small print" (A. 8a-9a).

On the basis of the evidence, the District Court found that the petitioner had not sustained its burden of proving that the "pilotage clause" was a part of the oral agreement between the parties (A. 17a). The Court of Appeals,

after reviewing the evidence and the applicable law, affirmatively stated that it agreed with the finding of the District Court (A. 24a). The Court of Appeals also agreed that there was no "waiver" of liability by the signing of a mere time-receipt and payment of an invoice subsequent to the grounding (A. 26a).

The respondent had urged that the petitioner's breach of its contract to furnish adequate tug assistance was a proximate concurring cause of the grounding and represented an alternative basis for recovery against the petitioner irrespective of the pilot's negligence or the applicability of the "pilotage clause". The District Court concluded that the customary practice in Kill Van Kull required the petitioner to furnish two tugs, but held that the pilot's negligence rather than the lack of tug assistance was the proximate cause of the grounding. The respondent raised this argument again in the Court of Appeals, but the Court of Appeals upheld the District Court on this holding as well (A. 26a).

Questions Presented

The petitioner in its statement of the "Questions Presented" at pages 2-3 of the petition argues indirectly for a shifting of the burden of proving non-applicability of the "pilotage clause" to the respondent. There is no basis in the facts or law for such argument (A. 17a). The respondent contends that the "Questions Presented" are as follows:

1. Were the Courts below correct in concluding that the petitioner had the burden of proving that a liability exemption provision appearing in small print at the bottom of

non-contractual papers and purporting to free the petitioner from the negligence of its pilot-employee, was a part of the oral pilotage and towing agreement between the parties?

2. Were the Courts below correct in concluding that the petitioner had not factually sustained its burden of proving that the liability exemption provision was a part of the oral pilotage and towing agreement between the parties, particularly where it appeared that the exculpatory provision in such non-contractual papers had never been brought to the attention of the respondent or its agent?

3. Were the Courts below correct in concluding that exculpatory language appearing in small print at the bottom of a form of time-receipt signed by the Master of the ATLAS, after the grounding and in an invoice paid by the agent of the respondent after grounding, did not constitute or effect a "release" or "accord and satisfaction" of the damages arising from the grounding in light of the circumstances in this case, particularly where it affirmatively appeared that the exculpatory language in such non-contractual papers was not brought, and did not come, to the attention of the Master of the vessel and does not appear that such language was ever brought to the attention of the respondent or its agent?

4. Is the decision of the Court of Appeals sustainable on other grounds asserted by the respondent in the Courts below?

Reasons for Denying the Writ

It is respectfully submitted that review by this Court is not warranted.

1. *There is no important question of federal law.*—The petitioner states that there are two law questions of great importance to the business world which should be settled by this Court: One, it is said, involves the scope of review by the United States Court of Appeals when presented with a question of law decided adversely by a District Court. The other, it is said, is the legal effect of prior and subsequent dealings between the parties to a contract where the essentials of a contract are agreed upon orally.

The decisions of the Courts below turn upon the peculiar facts of this case, namely, the particular communications and papers passing between the parties or their agents and employees prior and subsequent to the grounding. These facts are hardly likely to be duplicated in any other case.* It is established practice that where a towing company seeks to avail itself of a release from liability in its engagements with a shipowner, the towing company will almost invariably either enter into a "master contract" with the shipowner covering all pilotage services to be performed by the towing company and expressly providing

* The petition states at page 5: "Without directly passing upon the legal conclusions to be drawn from the stipulated facts in this case, the District Court dismissed the libel [sic], seemingly under the belief that the previously decided cases which he cited laid down the test for the minimum proof required." However, the cases cited by the District Court in which the "pilotage clause" was found to be a part of the towing contract, were expressly cited only for illustration or "comparison" (A. 16a), further indicating the minimum effect as precedent of any "towing contract" case decided upon its own peculiar facts.

for the release from such liability, or enter into an informal contract by an exchange of correspondence specifically bringing the "release from liability" clause to the attention of the shipowner. Petitioner's practice is well described in *Transpacific Carriers Corp.* v. *Tug Ellen F. McAllister,* 209 F. Supp. 870 at page 873 (S. D. N. Y. 1962); rev'd, 336 F. 2d 371, 375 (C. A. 2, 1964).

The decision in the case at bar will have no bearing on any case where the towing company bargains or contracts expressly or by fair implication for the applicability of the "pilotage clause". It will have no bearing on any of the commercial cases to which the "Statute of Frauds" is applicable. Because this decision turned on its peculiar facts, it will have no bearing as precedent on other cases, except, possibly, for purposes of illustration or "comparison".

2. *There is no conflict with decisions of Courts of Appeals of the other circuits.*—The petitioner urges that the decision of the Court of Appeals in this case is in conflict with the decisions in other circuits with respect to the applicability of the standard of appellate review termed the "unless clearly erroneous" doctrine. However, a reading of the opinions of the Courts in the cases cited* by the petitioner, indicates that the decisions in those cases are not in conflict with the decision of the Court of Appeals in this case. The question before the Court of Appeals in this case was simply whether the petitioner had sustained its burden of proving that the "pilotage clause" appearing

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* *Olah* v. *S.S. Jaladurga,* 343 F. 2d 457, 459 (C. A. 4, 1965); *Automatic Devices Co.* v. *Automatic Devices Co. of Pa.,* 292 F. 2d 663 (C. A. 3, 1961); *Green* v. *Bluff Creek Oil Co.,* 287 F. 2d 66 (C. A. 5, 1961).

in papers which did not purport to be a part of any contract was, nonetheless, a part of the oral contract between the parties. The District Court found that the "pilotage clause" was not a part of such contract. This finding would ordinarily be considered a finding of fact, *Williston On Contracts* (Third Edition), Vol. 4, §662, rather than a question of law as was posed in the cases from other circuits cited in the petition.

The Trial Court stated (A. 17a):

> "The burden is upon the respondent McAllister Bros. to establish by a fair preponderance of the credible evidence that the pilotage clause was part of the contract between these parties. *G. Robitzek & Bro. Inc.* v. *Davis,* 296 Fed. 107 (2d Cir. 1923); *The Gulf Maracaibo,* 75 F. Supp. 20 (E. D. N. Y. 1947). It has failed to carry that burden."

The Court of Appeals agreed that the petitioner had not sustained its burden of proof (A. 25a). This was a finding "on the facts".

In any event, a reading of the opinion of the Court of Appeals and the dissenting opinion of Judge Hays, indicates that the Court of Appeals did make a broad and independent review of the legal and factual questions raised by the petitioner, and concluded that the petitioner had not sustained its burden of proving that a "pilotage clause" was a part of the oral agreement between the parties. It affirmatively found that "the district court was justified" in its findings (A. 24a).

The petitioner in the Court below filed a petition for rehearing "in banc", and a supplemental petition for re-

hearing "in banc". Each of said petitions was deemed by the Court below as being a request for reconsideration by the panel which heard the appeal and by the Court "in banc". These petitions together raised the very questions now raised by the petitioner in this Court. Specifically, in the supplemental petition to the Court below, the petitioner raised the question as to the applicable standard of review applied by the panel which decided the case at bar. The petitioner cited to the Court of Appeals the recent case of *Mamiye Bros.* v. *Barber Steamship Lines, Inc.*, 360 F. 2d 774 (C. A. 2, 1966). In the *Mamiye* case, the Court had distinguished between the applicability of the "unless clearly erroneous" doctrine to questions of law and to questions of fact.

The Court of Appeals denied the petitioner's requests for rehearing "in banc", on the ground that no active circuit judge requested that the case be reheard "in banc" (A. 31a, 33a), a denial which presumably would include a refusal by Judge Hays who had dissented from the majority opinion. Apparently, the Court of Appeals concluded that the *Mamiye* case had no bearing on the case at bar where a full review of the law and facts had been made by the Court of Appeals.

3. *The decision below is clearly correct.*—The opinions of the Courts below are well reasoned and based upon sound policy as well as principles clearly and consistently enunciated by the courts. It would be disruptive to sound commercial practice, and contrary to all precedent, to permit one party to a contract to obtain serious and substantial exemption from liability, or to effect a "release" or "accord and satisfaction" of accrued liability, by appending exculpatory language in small print which has not been brought to

the attention of the other party to miscellaneous "form" papers which are not and do not purport to be contractual in nature.

The only "law" relied upon by the petitioner to upset the holding of the decision of the Court of Appeals is to be found in legal texts which, upon perusal, carry a refutation of the petitioner's contention. Petitioner cites at page 8 of the petition, *Williston On Contracts* (Third Edition), Vol. 1, §90a., pages 292-293, which states:

> "The acceptance of a paper which purports to be a contract sufficiently indicates an assent to its terms * * * "

However, none of the papers upon which the petitioner relies "purports to be a contract" but is rather a "mere" time-receipt or invoice.

4. *The decision is sustainable on other grounds asserted by respondent in the Courts below.*—The decision of the Courts below are sustainable on other grounds asserted by the respondent in the District Court and the Court of Appeals. The petitioner had breached its contractual duty of furnishing two tugs for the assistance of the respondent's vessel ATLAS in its passage through Kill Van Kull. But for this breach of duty, there would have been no accident, according to uncontradicted expert testimony in the District Court (A. 11a). Further, this breach of duty by the petitioner cast upon the petitioner the burden of proving that the breach was not the proximate cause of the grounding. *Bisso* v. *Waterways Transportation Company,* 235 F. 2d 741, 746 (C. A. 5, 1956). The petitioner made no attempt to rebut this testimony or to sustain this burden of proof.

CONCLUSION

The petition for the writ should be denied.

Respectfully submitted,

MELVIN J. TUBLIN
Counsel for Respondent
37 Wall Street
New York, New York 10005

POLES, TUBLIN, PATESTIDES
& STRATAKIS
THEODORE P. DALY
of Counsel